

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 08-4345 SBA (PR)

JOSE L. RICO,

Petitioner,

ORDER OF DISMISSAL

v.

MIKE KNOWLES, Warden,

Respondent.

No. C 08-4346 SBA (PR)

JOSE L. RICO,

Petitioner,

ORDER OF DISMISSAL

v.

MIKE KNOWLES, Warden,

Respondent.

Petitioner is a prisoner of the State of California who is incarcerated at the California Medical Facility. He has filed two pro se petitions for a writ of habeas corpus, and he also requests leave to proceed in forma pauperis. Petitioner did not name a respondent in these actions. Mike Knowles, the current warden at California Medical Facility, has been named as Respondent pursuant to Rule 25(d) of the Federal Rules of Civil Procedure.

Upon reviewing both petitions, it is apparent that the petition in Case No. C 08-4346 SBA (PR) should have been filed as a supplement to the petition in Case No. C 08-4345 SBA (PR).

DISCUSSION

In both petitions, Petitioner alleges that he received a sentence that was "to [sic] stiff for the crime." (Pet. in Case No. C 08-4346 SBA (PR) at 3.) He further claims he was "the victim in the case." (Id.) He seeks relief in the form of a "lighter sentence." (Id.) He admits that he did

1 not exhaust his state remedies before filing his petitions.

2 Prisoners in state custody who wish to challenge in federal habeas proceedings either the
3 fact or length of their confinement are first required to exhaust state judicial remedies by
4 presenting the highest state court available with a fair opportunity to rule on the merits of each
5 and every claim they seek to raise in federal court. See 28 U.S.C. § 2254(b),(c); Rose v. Lundy,
6 455 U.S. 509, 515-16 (1982). If available state remedies have not been exhausted as to all claims,
7 the district court must dismiss the petition. Id. at 510; Guizar v. Estelle, 843 F.2d 371, 372 (9th
8 Cir. 1988). A dismissal solely for failure to exhaust is not a bar to returning to federal court after
9 exhausting available state remedies. See Trimble v. City of Santa Rosa, 49 F.3d 583, 586 (9th
10 Cir. 1995).

11 Because Petitioner did not present his claims to the state supreme court for review, either
12 in a petition for review or in a state petition for a writ of habeas corpus, his federal petition is
13 unexhausted and must be DISMISSED. This dismissal is without prejudice to Petitioner
14 returning to state court to exhaust his state remedies and then filing a new federal habeas corpus
15 petition. Should he do so, he is advised to file his new federal habeas corpus petition as soon as
16 possible after his state court proceedings have concluded. The Court makes no ruling at this time
17 on the issue of the timeliness of any future federal petition.

18 CONCLUSION

19 For the foregoing reasons,

20 1. The Clerk is ordered to revoke filing of the petition in Case No. C 08-4346 SBA
21 (PR) and to file it as a supplement to the petition in Case No. C 08-4345 SBA (PR).

22 2. The Clerk shall close Case No. 08-4346 SBA (PR). No filing fee is due in Case
23 No. 08-4346 SBA (PR) as this action was opened in error. The Clerk is directed to file Plaintiff's
24 application for in forma pauperis status in Case No. 08-4346 SBA (PR) as an application for in
25 forma pauperis status in Case No. C 08-4345 SBA (PR).

26 3. Plaintiff's application for in forma pauperis status that was transferred to Case No.
27 C 08-4345 SBA (PR) is GRANTED.

28 4. Plaintiff's petition and supplement to the petition are DISMISSED as unexhausted.

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

JOSE LUIS RICO,

Plaintiff,

v.

/ et al,

Defendant.

Case Number: CV08-04345 SBA

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on November 3, 2008, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Jose L. Rico G-01731
California Medical Facility
P.O. Box 2000
Vacaville, CA 95696

Dated: November 3, 2008

Richard W. Wieking, Clerk
By: LISA R CLARK, Deputy Clerk